IN ARBITRATION PROCEEDINGS
PURSUANT TO THE AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy **between** **CITY OF PORTLAND** **and** **PORTLAND FIREFIGHTERS ASSOCIATION** **RE: Company Inspection Grievance**	**OPINION AND AWARD** **of** **Charles H. Pernal, Jr.** **Arbitrator** **May 2, 2002** **Oakland, California**

This Arbitration arises pursuant to the Labor Agreement ("Agreement") between Portland Fire Fighters Association, Local 43 ("Union"), and the City of Portland, Oregon ("Employer"), under which Charles H Pernal, Jr. was selected to serve as Arbitrator and under which his Award shall be final and binding upon the parties as defined in the Agreement.

Hearing was conducted on February 4, 5, and 6, 2002 at City Hall, Portland, Oregon. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. Both parties filed post-hearing briefs timely postmarked on March 29, 2002, which were received on April 1, 2002.[1]

APPEARANCES:

On behalf of the Union:

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On behalf of the Employer:

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[1] References to the transcript shall identify witness name and page number; Employer and Union exhibits shall appear as "E- and "U- ", respectively

ISSUES

At hearing, the parties agreed to the submission of the following issues:

1. Is the grievance arbitrable?[2]

2. If arbitrable, did the Employer violate Articles 7, 8, and 13 of the Agreement by implementing the company inspection program in July 2001?

3. If a violation of the Agreement, what shall be the appropriate remedy?

RELEVANT SECTIONS OF THE LABOR AGREEMENT

ARTICLE 2 RECOGNITION

The City recognizes the Union as the sole and exclusive bargaining agent for the purposes of establishing wages, hours and working conditions for all sworn personnel of the Bureau of Fire, excluding the City Fire Chief, Fire Marshal, Division Chief, Deputy Chief, and Assistant Fire Marshall.

ARTICLE 3 MANAGEMENT RIGHTS

The City retains all rights except as those rights are limited by specific provisions of this Agreement. Nothing anywhere in this Agreement (for example, but not limited to, the recognition provisions) shall be construed to impair the right of the City to conduct its business in all particulars except as modified by the specific provisions of this Agreement, and subject to applicable laws, civil service, and other regulations. Except as especially modified or restricted by this Agreement the City's reserved rights include, by way of description and not by way of limitation, the exclusive right in accordance with its judgment to reprimand, suspend, demote, discharge, or otherwise discipline employees for just cause except as modified in Article 26 of this agreement; hire, promote, transfer, lay off and recall employees to work; maintain the efficiency of employees, (install incentive bonus plans); or expand, reduce, alter, combine, transfer, subcontract out; assign or cease any job, operation or service, inside or outside the City limits of Portland; control and regulate the use of equipment and other property of the City; determine the number, location and operation of bureaus, divisions, and other units of the City, or services to be provided, the schedules of service, the assignment of work, and the size and composition of the work force; introduce new and improved research, development, maintenance, services and methods, materials, and equipment, and otherwise generally manage the City and direct the work force.

The City's not exercising any function hereby reserved to it, or by exercising any function in a particular way, shall not be deemed a waiver of its rights to exercise such functions or preclude the City from exercising this Agreement, if not in conflict with the terms of this Agreement.

Nothing in this Agreement shall preclude the Civil Service Board from exercising its authority to classify, or reclassify positions and to establish entrance and promotional examination requirements. Employees shall perform all work assigned that is reasonably within the scope and terms of the classification specification, though not specifically described herein.

ARTICLE 7 HOURS OF WORK

The schedule of work for employees covered by this Agreement shall be provided for by the Rules and Regulations and General Orders of the Bureau of Fire.

A. Work schedules shall consist of the following:

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[2] At the start of hearing, the Employer argued, contrary to the Union, that the question of arbitrability of the grievance be determined prior to receiving any evidence bearing on the merits of the grievance. After considering oral and written (JT. E-6) argument of the Employer and oral argument of the Union, I concluded, in view of the existence of parallel facts as well as in consideration of efficiency and economy of litigation, that deferral of the issue pending development of a full record would constitute the more prudent course.

1. Twenty-four (24) hours on duty, forty-eight (48) consecutive hours off duty, twenty-four (24) hours on duty, etc.
2. Five (5) eight (8) hour days, 2 consecutive days off.
3. Any schedule presently regularly worked by Association members.
   or
4. Any other schedule mutually agreed upon by the parties.
5. The standard work schedule for suppression employees is a 53-hour workweek.
   The City will continue to schedule such functions on that basis where the needs of the Bureau of Fire necessitate.

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ARTICLE 8 WAGES, SALARIES AND ALLOWANCES

1. Wage Adjustments. In applying wage adjustments in Schedule A the employer will receive the rate of the new schedule in accordance with his/her time in grade as required by the new schedule, however, if his/her present rate is higher than or equal to the entry level for the new classification, the employee's salary upon promotion shall be at the lowest step which results in a pay increase. However, if an employee is appointed to a classification within the same pay grade (Fire Inspector/Fire Lieutenant), they shall retain their anniversary date for future pay increases. Notwithstanding the foregoing, those employees assigned as Fire Training Captains, Fire Training Officers, Staff Fire Captains, Staff Fire Lieutenants, harbor master, Fire Fighter Specialists, Fire Battalion Chiefs (40 hours), Fire Investigators and certified. Fire Inspector Specialist classification. Personnel below the rank of Captain assigned as Driver Instructor in training, Uniform & Fire Equipment Officer, or Recruiter in Human Resources and work a 40-hour week will be paid the same rate as Fire Training Officer. Upon being promoted to a higher line classification, such employees will be appointed at the entry rate for the new class. Should the rate for the premium pay assignment be higher than the entry rate for the new promotion class, the employee's salary (including premium) upon promotion shall be set at the lowest step which results in a pay increase. Employees assigned as an EMS Specialist from the rank of Fire Lieutenant will be placed on the step in the pay range for EMS Specialist which reflects their time in grade as a Fire Lieutenant and they shall retain their Fire Lieutenant anniversary date for future salary increases while assigned as EMS Specialist. If an employee is assigned as an EMS Specialist from the rank of Fire Fighter, the rules for promotion as stated above shall apply.

Hazardous Materials-Those employees certified for and assigned to the Hazardous Materials unit shall receive six percent (6%) over their regular wage for their classification.

Paramedic-Those employees certified for and assigned as Paramedics will receive eleven percent (11%) over their regular rate for the period of time assigned as a Paramedic.

Intermediate-Those employees certified and assigned as Intermediate on an Advanced Life Support unit will receive six percent (6%) over their base rate during the time they are assigned.

EMT P (Paramedic) Coaches when assigned as coaches will receive three (3) percent in addition to their EMT P hourly rate as set forth in Schedule A.

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ARTICLE 13 EXISTING CONDITIONS

(1) All mandatory conditions of employment relating to wages, hours, and working conditions not specifically mentioned in this Agreement shall remain at not less than the level in effect at the time of the signing of this Agreement. Any disagreement between the Union and the City with respect to this section shall be subject to the Grievance Procedure.

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ARTICLE 14 GRIEVANCES, COMPLAINTS AND ARBITRATION

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The arbitrator's decision shall be final and binding on both parties, but the arbitrator shall have no power to alter in any way the terms of this agreement. The decision of the arbitrator shall be within the scope and terms of this agreement and the arbitrator shall be requested to issue the decision in writing, indicating findings of fact and

conclusion, to both parties within thirty (30) days after the conclusion of the proceedings, including filing of briefs, if any. It may also provide retroactivity not exceeding sixty (60) days prior to the date the grievance was filed and shall state the effective date.

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FACTS

Preliminary Statement

For a period of time between 1986 and July 2001, inspections of businesses and residences for purposes of assessing fire code violations were effectively undertaken by inspectors working under the umbrella the Fire Marshall Office, an operational division of City of Portland Fire and Rescue (or "Fire Bureau," as more commonly termed in the vernacular and as contained in the Agreement). Effective July 1, 2001, however, the Employer implemented the first phase of its Company Inspection Program ("Program") pursuant to which fire fighters assigned to fire suppression and emergency medical response companies at three designated Stations within the City were assigned to perform fire code inspections heretofore performed by Fire Marshall inspectors.

Contrary to the Employer, the Union asserts this action constitutes a violation of the Agreement, most notably, of Article 13(1) Existing Conditions. The Employer asserts implementation of the Program is its right as grounded in the Public Employment Collective Bargaining Act (PECBA), as well as in Article 4 Management Rights as it relates to "the assignment of work."

Article 13(1), in turn, requires some interpretation as applied to this controversy. Suffice it to say, there is some statutory as well as collective bargaining history underlying the language of this Article.

Some Relevant Organizational Components Of The Bureau

The bargaining unit consists of all sworn personnel of the Bureau, excluding the City Fire Chief, Fire Marshall, Division Chief, Deputy Chief, and Assistant Fire Marshall classifications. The bargaining unit numbers about 670, with a little over 600 employed in fire suppression companies.

The Bureau is headed by a Commissioner of Public Utilities and member of the City Council, Jim Francesconi, who, among other duties, appoints the Fire Chief, currently Ed Wilson. The Fire Chief is responsible for the day-to-day management of the Bureau. Two organizational divisions within the Bureau have relevance herein: Emergency Operations[EOPS] and Fire Prevention [also known as Office of the Fire Marshall or FMO]. Both divisions are charged with what the general public regards as the essential public service of fire fighting and medical rescue: EOPS, with fire suppression and emergency medical services; and the Fire Marshall with fire prevention, including inspections for fire code violations.

Division Chief G_____ and three deputy chiefs oversee four emergency response districts within EOPS. In turn, three battalion chiefs are assigned to each of Emergency Response Districts 2-4. Each District contains a number of fire stations [District 1 contains one station[3] and performs other organizational functions]. The Bureau has 27 Stations. Each Station is assigned a geographical area,

[3] Fire Station 1 is under the organizational umbrella of District 1, which includes management and personnel functions such as the operation of the Traveler and Kelly Relief pools.

known as a Fire Management Area [FMA], which constitutes the first response area for a fire company within an assigned District.

A Station, in turn, always consists of at least one engine [the vehicle that carries water and hose] and may additionally include a truck [the longer vehicle carrying ladders and forcible entry tools]. Some Stations also have rescue vehicles staffed by two paramedics who provide advanced life-support services. Paramedics also staff all engines and trucks.

The personnel assigned to each truck or engine constitute a company; each company consists of three rotating shifts. Fire fighters work a 24-hour day for an average 53-hour workweek, with 24-hours on, 48-hours off, and with the 19th day ["Kelley day"] being an additional day off. Each Station is assigned a captain who works one of the three shifts and who also rides an apparatus. There is at least one lieutenant assigned to each other shift and who rides the apparatus. In total, there are 27 engine companies, nine truck companies, and one rescue squad.

The FMO is headed by Fire Marshall C____, a position of division chief rank, and Chief Deputy Fire Marshall B____, who is charged with overseeing a number of fire prevention functions. Within the FMO are specialists who review the installation of new fire alarm and suppression[sprinkler] systems; fire investigation inspectors who, except for one, have police academy training and are certified as police officers for investing arson crimes; and fire code enforcement inspectors who inspect buildings, for instance, for general hazards. Within this latter fire code enforcement function, inspectors are assigned to a senior inspector within defined geographical areas.

Additionally, there are fire code inspectors who work out of Stations and who also work as company fire suppression personnel. In this regard, three inspectors, called shift inspectors, are each assigned their own City vehicle equipped with a radio so that they can both engage in inspections and also meet their assigned apparatus at the scene of a fire should the need arise. These shift inspectors are on the same 53-hour per week work schedule as company personnel.

Some Duties of Fire Fighters

During a shift, fire fighters "may fight fires (exposing themselves to injury or death) and treat medical emergencies (assisting citizens who are ill, injured, or dying. …Periods of intense activity can be followed either by further intense activity or by "down time" awaiting further activity. Emergency calls can occur at any time; fire fighters are unable to schedule or control the time when they will be called to an emergency. Fire fighters' sleep can be interrupted frequently be emergency calls."

Activities by station personnel during the 24-hour shift are categorized as structured and unstructured time. Structured time includes community partnership[meeting with neighborhood association groups], administrative[paperwork, most likely performed by a company officer], apparatus[truck and engine] maintenance, equipment maintenance, incident responses[the amount of time attributable to a fire or medical call], ready time[time associated with preparing to completely return back to service after an incident response], morning briefing, training, physical fitness, pre-fire surveys, station maintenance, hydrant inspections, "move up"[moving into another fire management area to more adequately cover the City in the event a number of rigs are in service], and some "other" accountable activities not easily identifiable in the foregoing categories.

Unstructured, or down time, includes sleep time, meal time [including shopping and preparation] and "free time." As it relates to implementation of the Program at issue, this down time is at issue. The record reveals that in prior proceedings the Union has argued the importance of free time as it relates to increased workload, given firefighter need to relieve stress arising from exposure to life-threatening situations, violent or under-the-influence citizens, diseases, and hazardous materials.

Since the Bureau first began first responder medical services in 1986, the number of incident runs has followed a generally upward trend over the years. U-38 provides a breakdown of responses under the categories Fire, EMS, and Other. Over time Fire runs have declined from 3,861 in 86-87 to 2790 by 00-01; EMS increased from 28, 715 in 86-87 to 36, 202 in 00-01; Other was 10, 589 in 86-87 and 20, 660 in 00-01. Since 1986 the total number of fire fighters, as well as the total number on duty during an average day, has decreased.

Events Preceding Negotiations For The 1990-1994 Agreement

Prior to 1986, both inspectors and company level fire suppression personnel performed "company level" fire code enforcement inspections, the same type of inspections at issue with respect to the current Program. In 1975, for instance, each fire fighter and company officer was assigned, utilizing their personal vehicle, about 10 inspectable occupancies.

The class specifications for fire fighter, lieutenant and captain have consistently included performance of fire code building inspections.

This duty is to be distinguished from pre-fire inspections, or company familiarization with buildings within an assigned FMA. This duty has continued to be---and is now--a consistent and important duty of company personnel. Thus, places where hazardous material may be located, or, in the case of apartment buildings, locations where people can be isolated and assisted with finding exits to the outdoors, can be identified.

As to fire code inspections, however, for the period up to 1986, battalion district inspectors within the FMO were responsible for training fire suppression personnel in fire code enforcement duties.

This changed. In 1984-85, the Employer decided that all uniformed personnel through the rank of captain would be trained beyond basic CPR and crash injury and, in addition, all would receive certification as emergency medical technicians (then termed EMT-1, currently termed EMT Basic). Bureau personnel would thus become medical first responders analogous to ambulance service first responders.

In view of this, in 1886, then Union President L_____ met with then Bureau Chief O_____ to discuss the increase in the volume of calls to which firefighters would be responding as part of this first responder system, as well as the increase in continuing training time required to maintain EMT-1 certification. As a result, Chief O____ rescinded the General Order that required that firefighters perform code enforcement inspections, and such inspection duties were placed within the FMO. The Union identified this as a workload trade-off resulting from increased runs attributable to medical responses. The Employer identified the impetus for this as relating solely to increased training responsibilities.

In 1990, before collective bargaining commenced for what became the July 1, 1990-June 30, 1994 Agreement, the issue of company level fire code inspections resurfaced. There began an exchange of correspondence that sounded themes advanced by the parties to the present day.

After learning that the Employer was considering the assignment of fire code inspection duties back to company level firefighters, the Union hand delivered a letter dated April 13, 1990 to current Chief M_____ in which was stated:

> …This change in workload will result in substantial increases in fire fighter training, responsibility and duties. …
> …Accordingly, the Association hereby demands to bargain the decision to add fire inspection duties and responsibilities to fire fighters' workload and the impact of such a decision on the wages, hours and working conditions of members of our bargaining unit.
> …

By letter dated April 16, 1990, Chief M_____ responded:

> …I feel that the upcoming changes to this program are simply the fine-tuning of an existing program. It does not represent a major change in the duties and responsibilities of firefighters. …
> …I disagree with your assertion that these program changes will result in substantial increases in firefighter training, responsibility and duties. The training, responsibility and duties associated with fire prevention inspections have long been an integral part of a firefighter's job. If you will review the current job related job description for firefighter, you will find that inspection responsibilities are very prominently described.
> As you are currently in negotiations with the City, I would suggest that as the correct forum to further address this issue. …

Chief M_____'s letter was followed by a letter to the Union dated May 16, 1990 from the Employer's chief negotiator, S_____. After reciting the provisions of the then current Agreement's management rights clause, S____ stated:

> …
> It is our position that we are not obligated to bargain this decision to assign this work with the PFFA under the provisions of the Public Employees Collective Bargaining Act (PECBA). In addition, existing contract language clearly reserves the right to manage the direction of the bureau and to assign the work which it deems necessary to meets (sic) the goals and objectives of the bureau.
> While the scope of bargaining issues may been (sic) muddied somewhat by recent ERB cases, it is our position the <u>decision</u> to assign work is not a mandatory subject of bargaining. We will continue to meet our statutory obligations to bargain over the impact of those decisions which affect wages, hours and working conditions.
> I have informed Chief Davis that the implementation of training for General Order Number 7 should proceed as planned. Chief Monogue and Chief Davis have indicated to me that they expect that actual company fire code enforcement inspections could begin as early as September of this year of the beginning of 1991.
> …

Negotiations For The 1990-1994 Agreement

At about the same time as the exchange of correspondence recited above, the Union filed an unfair labor practice charge concerning the proposed implementation of company inspections. However, the subject matter ultimately litigated before the ERB was not whether General Order Number 7 constituted a unilateral change [and, inferentially, a mandatory subject of bargaining], but concerned, instead, whether the Union had made a proposal regarding workload concerning which the Employer refused to bargain. The ultimate issue posed to the ERB and the ERB's Findings appeared to do little to provide pragmatic guidance to the parties relating to their fundamental disagreement concerning their respective legal obligations. But the parties continued to deal with company inspections during their bargaining for a successor agreement: The Employer taking the position it was engaging in "impact" bargaining and continuing to "talk" about the "content of the decision;" the Union contending it was engaging in decision and impact bargaining.

However, the distinction made by the Employer did not necessarily provide a practical impediment to negotiations in 1990. This was due, notwithstanding that certain subject matter might be "permissive" under the PECBA, to the Employer's approach to negotiations with the various unions representing City employees. In this regard, the Employer practice when it bargained with interest arbitration collective bargaining units would be to notify such units of proposed changes, receive proposals from unions, and try to reach agreement. Should there be no agreement, the Employer prepared a letter notifying a union that the subject was permissive, and the subject matter would not be taken forward.

But the company inspection issue was not ultimately dropped during negotiations for the 1990-1994.

Rather, on February 8, 1991, the parties entered into a Memorandum of Agreement memorializing the mutually agreed changes to the predecessor Agreement. This Memorandum of Agreement format contains the changes to the template of what is the language of the preceding, expired Agreement. The Memorandum of Agreement is subject to ratification by the Union membership as well as approval by the City Council. The practice of the parties is to then conform such a memorandum of agreement, as the parties then did in 1991, into the final writing of what then became a new Labor Agreement.

Regarding the issue of company inspections, which remained unresolved during negotiations, the Memorandum contains the following language:

> 10. The parties agree to the creation of a joint labor/management committee to study the creation of a company inspection program. If the committee is unable to agree upon a plan by July 1, 1991, the parties agree to interest arbitrate[4] all remaining issues between the parties concerning the company inspection program.

[4] ORS 243.736 prohibits firefighters and other enumerated personnel from engaging in a strike. As an alternative, ORS 243.742 provides for binding [interest] arbitration for employees precluded by Statute from striking.

The Interest Arbitration Award ("Lehleitner Award")

The study committee was unable to reach any agreement concerning the company inspection program and the issue was heard by Arbitrator George Lehleitner in an interest arbitration proceeding over a five day period stretching over January-March, 1992. The Opinion and Award issued on May 20, 1992.

The Employer's detailed draft of its yet to be implemented company inspection program was at issue. The essence of that program, however, was the number of inspection assignments involved. While there was a four year cycle of a maximum of 540 inspections per company, this worked out to a maximum of 115 inspections per company per year, or a more refined maximum of 45 inspections per year by each of the three shifts within a company. Each occupancy covered by the program was to be inspected once during a four-year cycle. The occupancies to be inspected were of the type known as priority 2 as defined by the National Fire Protection Association code classification system. These were occupancies such as dining establishments, gasoline stations, hotels and apartment buildings for which inspection requirements were not as priority 1 inspections. There was the requirement for up to two re-inspections per occupancy.

The Union argued for a reduction in the 53-hour work week as compensation for the increase in workload; the Employer argued for no increase in compensation and advanced the position that the actual number of assignments under the program would be flexible, depending on individual company workload, despite the program targets.

Among Arbitrator Lehleitner's findings was the following:

> …the point that is obvious to me is that firefighter workload has been increasing. More to the point, the inspection program proposed by the City constitutes an increase in workload, although in my view certainly not one that is equivalent to a work week reduction of five hours per week…. This being so, a figure of 52 hours per year constitutes a reasonable estimate of the extra workload for each firefighter, …

Arbitrator Lehleitner's Award resolved the controversy by propounding the following paragraph to Article VII-Hours of Work:

> C. If the workload of employees of fire companies is increased to include code enforcement inspection duties, the City shall either reduce their standard work schedule from a 53-hour work week to a 52-hour work week, or at the City's option provide equivalent time off or an equivalent increase in their hourly wage rate. This provision only applies to those suppression employees who are required to perform code enforcement inspection duties.

This Opinion and Award obviously issued prior to the 1995 amendments to the PECBA. Perhaps therefore, the precise term "*de minimis*" was not advanced by the Employer. My reading of the Lehleitner Award, however, suggests that, at the least, the Employer was then fairly advancing the contention that the increase in workload, coming, as it did, out of firefighter down time, was not so substantial as to warrant any changes to the overall compensation scheme reflected in the 1990-1994 Agreement.

Post-Lehleitner Award Events

The Lehleitner Award's proposed contract language is subject to a condition: namely, the implementation of the company inspection program at issue at the arbitration proceedings. However, the Employer did not implement its proposed company inspection program. And the language was never memorialized in a manner similar to the parties' practice with the Memorandum of Agreement.

From the Union's standpoint, the matter was "dropped" by the Employer. The Union did not move to incorporate the Lehleitner Award's the 1990-1994 Labor Agreement because 1.) it viewed the Award as akin to general orders and side agreements, the formal inclusion of which would "weight down" the Labor Agreement and (2) it, like other side agreements, was incorporated by virtue of Article 13 Existing Conditions.[5]

The Union's Evidence Concerning Prior Interpretation of Article 13

The record contains one 1988 Arbitration Opinion ["Knudson Award"] and two 1991 Arbitration Opinions and Awards which were entered into evidence ["Hayduke Award;" "Wilkinson Award"]. The Union argues each Award is representative of subject matter not delineated in the Agreement, but which were subject to enforcement under Article 13 Existing Conditions. I agree that the Hayduke Award represents such an application; I have reservations whether the Knudson Award and Wilkenson Award can be so understood.

The issue resolved in the Hayduke Award was whether the cessation of the Employer's policy allowing certain inspectors the take-home commuter use, upon payment of a rental fee, of City-owned vehicles was a violation of Article 13. First, Arbitrator John Hayduke certainly referred to an unidentified "previous" arbitration award that concluded that Article 13 applied to mandatory subjects of bargaining. Arbitrator Hayduke then noted the Employer's acceptance of the proposition advanced in an unidentified 1988 award to the effect that Article 13 applied to mandatory subjects of bargaining: "The City's second argument, that since it is accepted (based upon the prior arbitral award) that the existing conditions clause applies only to mandatory subjects of bargaining…" He concluded: "It is clear to the arbitrator that the take-home use of City vehicles by employees is a *working condition*(Italics supplied) within the meaning of Article XIII."[6] Elsewhere, he concluded, adopting the Union characterization of "monetary benefit," that take-home was "a monetary benefit" and a "benefit within the scope of Article XIII"…and…"such conditions must be maintained and cannot be diminished during the life of the collective bargaining agreement." He then rejected the Employer's reliance on Article III Management Rights, concluding that Article XIII "does not totally negate" Article III, and the "direct monetary benefits" of take-home use of vehicles falls within the Article XIII modification and restriction of Article III.

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[5] I construe the Union's assertion as bearing on state of mind to explain why the Union did not move to incorporate the language into the 1994-1996 Labor Agreement. The language of Article 13, of course, addresses those specific wages, hours and working conditions in effect only "at the time of the signing of this Agreement," or conditions which presumably were in effect well before the time of the issuance of the Lehleitner Award.

[6] In my discussion elsewhere, I use the Arabic "13" to conform to the numbering style in the current Agreement; the 1990-1994 Agreement utilized Roman numerals for purposes of numbering sections.

I do not read Arbitrator Hayduke to have specifically identified Arbitrator Knudson as the author of the previous Opinion and Award, and the introduction of U-33 may have been in error. I say this because the Knudson Award in evidence certainly was not founded on an interpretation of Article XIII:

> The sole issue in this dispute is whether the transfers of Feldman and Wolfe out of the FAD office violated their seniority rights under Article XVI of the current City-Union collective bargaining agreement. Not only did the union so limit the dispute, but not a single mention of the applicability of Article XIII, Existing Conditions, appears in the union brief. …

Arbitrator Jane Wilkinson did have the Hayduke Award before her when dealing with a grievance protesting the Employer's transfer of bargaining unit work to a City employee not represented by the Union. While the Union contended this circumstance violated Article XIII Existing Conditions, Arbitrator Wilkinson expressly "rejected a finding based on the Arbitrator Hayduke rationale," distinguishing the circumstances before her from that before Arbitrator Hayduke. Rather, I understand Arbitrator Wilkinson to have interpreted certain language in Article III as "ambiguous" with respect to the subject of transferring out work. While sustaining the grievance, she applied a "weighing of competing interests" test and found that unilateral action is permitted by an employer only "when there is a compelling operational need."

Negotiations For the 1994-1996 Agreement

The Lehleitner Award became a topic of discussion during negotiations for what became the 1994-1996 Labor Agreement. The Union referred to the Award as an example of how an arbitration award could become part of the Existing Conditions clause, and the Employer contended that that Award interpreted the clause in a particular way and that the Award was not, of itself, something that became part of the Existing Conditions clause.

Rather than utilize the more traditional adversarial model for a successor collective bargaining agreement, in 1994, the parties began utilizing a collaborative, or interest-based, bargaining model and employed a facilitator who assisted the parties to identify common interests. In about May 1994, the Employer, in the context of the need to accomplish more fire code inspections, raised the company inspection issue. In response, the Union proposed that the work week be reduced to 52 hours or that additional inspectors be hired, an economic proposal which the Employer calculated to be of relatively equal cost to the Employer. The matter was left unresolved and set aside.

In August 1994, the Employer proposed that the Union agree to a document relating to modifications to class specifications that included the re-institution of the Company inspection program. The Union responded that the implementation would have to be consistent with the terms of the Lehleitner Award.

On August 23, 1994, however, the Employer proposed replacing the existing Article 13 language with the following

> Except for subjects reserved in Article III Management Rights or mentioned in this Contract, the City shall notify the Union prior to implementing proposed change(s) in wages, hours or working conditions for members of the bargaining unit which are mandatory subjects of bargaining. The Association shall have ten (10) working days to

> demand to bargain. If no demand to bargain is made, the City may implement the change. If the Association demands to bargain, the City will comply with its statutory obligations. The exclusive remedy to enforce this paragraph is under the ORS 243.672(1)(e). This paragraph is not subject to the grievance procedure of this agreement.
>
> However, the Existing Conditions clause was not modified.

The Employer withdrew the company inspection proposal. This was memorialized in a letter dated September 14, 1994 from Sr. Human Resources Analyst , C_____ within which he informed then Union President L____ that it regarded the compensation formula of Lehleitner Award as expiring with the 1990-1994 Agreement.

The 1996-1999 Agreement

In April 1996, the Employer again advanced the issue of company code inspections at collaborative negotiations for the 1996-1999 Labor Agreement. This did not result in any changes with respect to performance of company code enforcement duties.

1997 Mid-Term Bargaining

Meetings occurred in the context of Fire Bureau budget restrictions that had been impacted by virtue of a State ballot measure.[7] The Union, by letter dated March 12, 1997, made a preemptive demand to bargain certain proposed changes in employment relations including a plan to have company personnel perform fire code inspections. This was followed by a letter dated May 7, 1997, notifying the Union of more detailed changes, including a company inspection program consisting of a minimum of 5 inspections per company per shift per month. This was followed by another Union demand to bargain dated May 20, 1997.

From the Employer's perspective, it was merely starting its process of soliciting Union proposals to changes that it intended to implement-- whether the subject matter was mandatory or permissive-- and then to seek an agreement. Also, however, the Union continued to advance it's position that the Lehleitner Award addressed how the issue of company inspections should be handled; that the Award survived by virtue of Article 13 Existing Conditions; that the compensation scheme provided in the Award was a floor to the Union's bargaining position; and that, in addition to safety implications, the Employer's proposal impacted on workload. During negotiations on June 24, 1997, the Employer stated it's position that company inspections encompassed scheduling of services to the public and assignment of duties which made the subject permissive, and that the parties needed to determine the effect on workload. The latter reference to workload was distinguished because "there were some obligations there."

The result of subsequent meetings was that certain agreements were reached on a number of matters, and the Employer dropped the company inspection issue.

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[7] Schedule A Salary Rates to the 1996-1999 Labor Agreement provides, *inter alia*, that the parties "will meet and discuss the economic impact and, by mutual agreement, will put forth a good faith effort to arrive at alternatives to a reduction in the work force."

Negotiations for the 1999-2000 Agreement

By this point in time, a revenue-generating component to the activities of the Fire Marshall's Office had developed. In about 1997-1998, fire code inspection fees began to be charged to business owners. The projected annual revenue of this program was about $40,000.

In June, 1999, the Employer advanced a program titled Station Based Prevention Programs encompassing "pre-fire planning, public education and minor code enforcement activities." Inspection goals were not defined under this program, but subject to the discretion of the Station Captain.

This generated an exchange of correspondence which resonated the familiar themes: The Union submitted a request for information by letter dated July 7, 1999 to the Fire Marshall and also by letter dated July 15, 1999 to the Employer's Lead Negotiator. The Union asserted that the program was "a mandatory subject of bargaining as it substantially impacts workload, monetary benefits, hours and safety" and subject to the formula of the Lehleitner Award. The Employer responded on August 18, 1999 with information concerning the program. Also advanced was its position that the Lehleitner Award was decided under a different bargaining statute (the PECBA underwent modification in 1995), that staffing levels, workload, and assignment of duties are generally permissive subjects of bargaining, and that the Lehleitner Award was relevant to the 1992 contract only.

During negotiations, the Employer offered the Union a longevity program to the compensation package, in exchange for Union willingness to agree to implementation of the company inspection program. The Employer's offer was made in an effort to advance collaborative bargaining, although it maintained inspections were not a mandatory subject. The Union was interested in longevity in the compensation package without any linkage to the company inspection program. The negotiations reached impasse.

The parties ultimately went to interest arbitration. This process resulted in an Award dated February 12, 2001 finding in favor of the Employer's last, best offer.

Encompassed within the Award was the addition of the word "mandatory" to Article 13(a), i.e. "All *mandatory* conditions of employment…" While the language change was advanced by the Employer, the Union in fact had previously agreed that Article 13 applied only to mandatory subjects of bargaining.

The Employer proposed the language modification because it had been attempting to clarify the Existing Conditions language in all its collective bargaining agreements given that the Union, and other collective bargaining representatives with whom the Employer dealt, had filed numerous grievances relating to permissive subjects which included references to existing conditions clauses. At about the time the parties were negotiating the 1999-2002 Labor Agreement, the Union filed two grievances involving transfers of employees, regarded by the Employer as a permissive subject, alleging that the Existing Conditions clause had been breached. The language modification was not tied to the parties' controversy regarding company inspections, however, and the Union had agreed to the modification to language prior to interest arbitration.

From the Employer's perspective, the 1999-2002 Labor Agreement has no language within it dealing with what the Employer regards as permissive subjects of bargaining. The Employer at interest arbitration did not present the company inspection issue because the Employer regarded it as a permissive

subject. However, the Employer had decided that, failing to obtain the company inspection concession from the Union, it would unilaterally implement its proposal.

Implementation Of The Current Company Inspection Program

In mid-March, 2001, the Union received a draft of what became the April 9, 2001 letter to sworn personnel from the Fire Marshall C_____ on the subject of company inspections. The Union responded by submitting a grievance on July 3, 2001 contending that this implementation constituted a violation of Articles 7, 8 and 13 of the Agreement. The Union sought implementation of the Lehleitner Award as a remedy.

Program Details

I intend to err on the side of providing a condensed, rather than tedious, description of what I understand are the salient aspects of the Program.

1. Occupancies. The Union contends that the Program is substantially similar in terms of workload as previous programs. The list of types of occupancies has been reduced. Certain "priority 2" occupancies, such as gasoline stations and restaurants with fire suppression systems, are now excluded. Companies are now responsible for one re-inspection, rather than two. The Program contemplates inspections of multi-family and simple business occupancies.

2. Four Year Phase-In. The first year, or Phase 1 effective July 1, 2001, included three stations: Stations 18 and 42 [each of which are engine companies] and 18, which is comprised of an engine as well as a truck company; Year 2, sees a planned expansion to 9 more stations; Year 3 expands to 9 more stations; and Year 4 to the remaining stations.

The Phase 1 stations were selected because they are representative of the types of FMA's found in the City and are staffed with personnel with inspection experience.

3. Training. The Program provides for initial training as well as ongoing training in hazard recognition, making and scheduling appointments, handling paperwork, and dealing with fees. Hazard recognition training of a type has also been provided in previous years. The training itself consisted of seven hours of in-room training followed by one and one-half hours of computer training in the Employer's FIRES 2000 computer program which tracks time spent on productivity.

4. As an anticipated result of the Program, there will be no shift inspector program: six of nine shift inspector positions will be eliminated and three will be converted to 40-hour inspector positions who will then be performing inspections other than those which are part of the Program.

5. The Program goal after full implementation is that all companies perform at total of 6000 inspections per year, or 150 inspections per company, or 50 inspections per shift per year.

The Inspection Process

Again, I provide a condensed recital. The inspection process entails the inspection itself, as well as some administrative aspects before and after the inspection performed by the FMO and company personnel.

1. Notification letters to owners of occupancies are issued by the FMO before the inspection. A specific appointment date is not set up. The norm, however, is to have a company officer make contact with the occupant prior to the inspection, but a general, not specific, time is set up.

2. Starting with a basic $35 fee, an additional fee is assessed based on type, residential (apartment, hotel, dormitory) or non-residential, and based on size.) Upon re-inspection if a hazard has not been corrected, referral to a 40-hour or 53-hour shift inspector is made.

3. Prior to the inspection, the field data form for the occupancy to be selected is reviewed by the company inspectors who determine whether they will need to make an appointment. During the inspection, a triplicate Fire Inspection Report form is completed. There are two versions: One which is preprinted to list eight common hazards with some space to write-in additional hazards, and a version without the hazard preprinting.

4. Generally, the entire shift crew of four will go out to perform inspections, so as to be prepared to respond, should an incident arise elsewhere during an inspection. The intent is that four different occupancies be selected so that shift personnel can inspect each respective occupancy. At the time of the inspection, the inspector meets the customer, reviews the information on the field data form, and updates it, if necessary. When the inspection is completed, it is presented to someone, if present, and the hazards and fees are reviewed, as well as the re-inspection protocols.

5. Upon return to the station, paperwork is processed. The field data form is attached to the front of the inspection report and sent to FMO, where it moves on to data processing.

The Impact Of The Company Inspection Program

Program impact on the Phase 1 companies' workload was a matter of some contention at hearing. The Employer argued any impact was *de minimis* or insubstantial; the Union argued to the contrary. The record contains anecdotal evidence from the Union, and statistical summaries from the Employer, which for the most part, were generated for purposes of the hearing.

1. Duration of Inspections--Station 42

Based on the testimony of a Station 42 firefighter and former fire code inspector, the Union argues that time necessary for inspections will increase over time. Thus, as company personnel become more familiar with the Program they will notice more code violations and record more violations. Inspections of fifteen minutes in duration would be reasonable for Stations 42 personnel, given the nature of occupancies inspected.

The Employer argues, to the contrary, that management experience shows that the greater familiarity with a program, including identifying common hazards, the quicker an inspection can be accomplished over time. With the projected increase in the frequency of occupancies being inspected, the

occupancies would be expected to be cleaner [and therefore faster to inspect], as was the case when the Employer first implemented the fee-based inspection program. Further, densely grouped occupancies, as in office buildings containing professional offices, each constitute a separate inspection, but would go faster than a residential inspection.

2. Time Related To Inspections --Station 42

The Union contends that the pre- and post- inspection paperwork and customer contact takes fifteen to thirty minutes, and this amount of time is unlikely to decrease over time. When company shift personnel go out in a group of four, sufficient time is taken to arrive at the occupancy by the time of the appointment. After an inspection, for instance, post-inspection data entry and paperwork processing takes place, lasting fifteen to thirty minutes, depending on interruptions or intervening work. This amount of time was estimated not likely to be affected over time.

While the Employer contends that forms pre-printed with the most common hazards make for a minimal time burden, the Union contends the pre-printed forms are not useful. The eight common hazards are the hazards most commonly found in businesses. The pre-printed form, which limits space for writing, is not applicable to residential occupancies, which are the main focus of Station 42. In multi-family occupancies, it is common areas, not the interior of apartments, which are inspected. Code violations are most commonly found in laundry rooms. For such occupancies, the blank form is preferred, because pre-printed hazards are not usually applicable, and take up line space necessary for the description of hazards actually found.

The Employer counters that its analysis of data from Station 42 shows, that of the eight common hazards, six appear on the coded inspection reports from Station 42, thus suggesting that the pre-printed inspection forms are useful at the company level. However, there is an element here of judging which codes can be appropriately fitted to the eight general hazards. Consequently, it is somewhat difficult to definitively assess the extent that pre-printed forms reduce inspection time.

3. Summaries Based On Data From FIRES 2000 And Daily Journal Systems

Again, the journal system, which tracks structured time, records travel and administrative time before and after the actual inspection. FIRES 2000 records actual elapsed inspection time. The FIRES 2000 program has the capability to generate summaries showing the occupancy and the actual elapsed time spent on inspecting the occupancy.

Preliminarily, it should be noted that company personnel are responsible for forwarding FIRES 2000 data (although not the data entry) and perform the data entry of journal time attributable to the previously described constituent components of what is termed structured time. Since Phase 1 inception, accounting for time attributable to company inspections, utilizing these two different systems, FIRES 2000 and the journal, has proved to be a lingering problem. At hearing, the Employer demonstrated a number of instances of over-recording of hours. After listening to the actual experience of Station 42 personnel and based on Station 42's experience, I have a lingering notion that there also may be some minor, discrete time intervals attributable to total inspection time which are not recorded because of the way the two systems structure data.

Bureau management have been well aware of this problem. Although Phase 1 officially commenced July 1, 2001, inspections started a few weeks later. By October 18, 2001, a memorandum

was distributed to company personnel on the subject of accurate journal entries. As late as December 21, 2001, journal entry errors were ongoing and FIRES 2000 and the journal systems were not reconcilable as to the total number of inspections performed.

4. Measures Of Program Impact

Union Exhibit 32. The Union introduced the six-month report assessing Program activities (U-32) for the period 7/1-12/31/01 [effectively a five and one-half month period]. This is a summary prepared for B____, Deputy Chief Fire Marshal, by Senior Inspector W___. I understand the purpose of the report's details as establishing a benchmark to assess future trends, or, "a reference point on a week-to-week basis, month-to-month basis as opposed to a watchdog system. It should be an indicator of are we having a problem overall, but not necessarily a specific problem."

The report Journal data breaks down the number of inspections and re-inspections performed, and the elapsed minutes ascribed to inspections. Of materiality herein, under the heading of Journal Entries for Inspection Related Activity,[8] average minutes per inspection *per member* was calculated:

17.6 minutes per Station 4 member [total staff of eight];
46.4 minutes per Station 18 member [staff of four]; and
33.8 minutes per Station 42 member [staff of four].

Another summary in U-32 consists of *minutes on site per inspection* obtained from FIRES 2000:

Station 4 shows 9.6 minutes on site per inspection;
Station 18 shows 11.8 minutes; and
Station 42 shows 14.7 minutes.

Employer Exhibit 14. The Employer prepared two sets [Scenarios] of data for purposes of hearing for the three Phase 1 stations. Each is based on data, which varies by Station, relating to the period July 1, 2001 to January 10, 2002. Each scenario measures the ultimate effect of the Program on a daily basis. It arrives at an average burden per shift per company per day.

Scenario A arrives at an average based on the number of actual inspections performed during the above time period. It has two bases: 1.) actual FIRES 2000 data, and 2.) an estimate of travel and related and administrative time of 20 minutes each side of the inspection. The resulting arithmetic mean based on total inspections actually performed for this period shows:

Station 4 shifts spend 16.4 minutes per day (24-hour shift) in inspection activity;
Station 18 spends 26.2 minutes per day; and
Station 42 spends 19.8 minutes per day.

Scenario B utilizes actual daily journal data and FIRES 2000 data, and assumes .53 inspections per day [recall that each company has a goal of 150 inspections].

Reducing this into a per day arithmetic mean shows:

[8] Recall that Journal activity takes in pre-inspection preparation, drive-time, paperwork and phone calls.

Station 4, with an engine and truck, would spend 22:28 and 32:40 minutes respectively per day in inspection time;
Station 18 would spend 26.20 minutes per day, and
Station 42 would spend 21 minutes per day in inspection related activity.

Lehleitner Award. For comparison purposes, I will restate Arbitrator Lehleitner's calculation. The Award issued under a different program with some different occupancy types and with different inspection goals [45 inspections per company shift per year]. But obviously there are common elements. Arbitrator Lehleitner appears to have taken the approach of assessing the yearly burden on *each firefighter*: "…This being so, a figure of 52 hours per year constitutes a reasonable estimate of the extra workload for each firefighter. This translates into an hour less per week or a 52 hour week."

I read the Award as allowing for training time in the calculation of hours, as well. This 52-hour standard, also, seems to have been sufficiently substantial to have been amenable to measurement by way of a compensation formula.

5. Comments

The Employer argues that companies have more than sufficient free time in their shift to meet the goals of the Program. Employer Exhibit-36 is a pie chart representation for an average day's activities at Station 42 based on journal entries of structured time (broken down into separate its separate components and unstructured time. Since it is based on journal entries, inspection travel is merged into a structured time "slice." Down time amounts to 14:48 hours over a 24-hour shift. However the impact is measured, the time associated with inspections must be derived from unstructured time, which, deducting time for meals and sleep, leaves an average of 4 hours and 18 minutes of free time per shift. The City Auditor has identified this free time as a productivity source for company inspections.

While shift personnel may work an arithmetic mean of 2.34 shifts a week, they in fact work one 24-hour day on, two days off, and one "Kelly" day off. On the one hand, inspection trips might compress 10 inspections one trip thus accomplishing much in relatively little time. On the other hand, incident call volume fluctuates seasonally. Call volume is down in winter and early spring, and increases in late spring and early summer. There is a variance to incident activity based on the day of the week. Businesses are more likely to be more available for an inspection during the weekdays, rather than weekends. And inspections obviously will be performed during daytime business hours. During each shift firefighters have a number of duties and also need time to sleep, eat and have down time.

The above measurements can be viewed as the parties' attempts to rationalize a situation, which is in fact rather difficult to model easily. The reality is that occupancy inspections are not entirely fungible and amenable to predictable scheduling. But I appreciate that the situation must be subject to some type of modeling, much as incident runs, for purposes of budgeting and providing services.

POSITIONS OF THE PARTIES

The Union submits:

(a) The grievance is arbitrable because it submits for determination in arbitration whether the City's action has effectuated a change within the meaning of Article 13 Existing Conditions and Articles 7 and 8.

(b) With respect to the merits, when the Employer implemented the Program, a mandatory subject of bargaining was implicated. The Employer increased the workload of fire suppression personnel assigned to truck and engine companies, and either failed to adhere to the formula of the Lehleitner Award which, parenthetically, established an "existing condition," or effectuated a change to the pre-existing condition of companies not performing code enforcement inspections.

(c) While the Employer may implement a Program, any such implementation may not adversely impact workload. Alternatively, implementation must be accompanied by remuneration based on the pre-existing 1992 Lehleitner Award and succeeding collective bargaining history which established that any increase in work load engendered by the Program must be accompanied by an increase in salary or an offsetting reduction in work hours.

(d) To remedy the contract violation, the Union submits that the Employer be directed to either restore the workload *status quo* prior to implementation of the Program either by removing fire code inspection duties from the companies -- or remunerate fire fighters pursuant to the formula established by the Lehleitner Award.

The Employer submits:

(a) The grievance is not arbitrable because there is no underlying provision of the Agreement for the Arbitrator to interpret.

(b) Rather than an attempt to enforce the Agreement, the Union's grievance is at its essence an attempt to enforce an interest arbitration award, a matter which cannot be accomplished by means of a contract grievance but which can be pursued only as an unfair labor practice under ORS 243.752(1).

(c) The grievance is not meritorious as a matter of contract. Article 3 Management Rights gives the Employer the right to implement the Program, and specifically gives the Employer the right to assign company inspection duties ("assignment of work").

(d) Article 13 Existing Conditions applies only to mandatory subjects of bargaining within the meaning of ORS 243.650(7)(a) and the Program is not mandatory, but, rather, a permissive subject of bargaining within the meaning of ORS 243.650(7(f): "…"employment relations" expressly excludes…scheduling of services provided to the public, …assignment of duties, workload when the effect on duties is unsubstantial or *de minimis*.

(e) Assuming workload and a mandatory subject of bargaining are at issue, any increase to workload in any event is *de minimis* or insubstantial and would not constitute a violation of Article 13.

OPINION

A. The Arbitrability Of The Grievance

I understand the Employer's argument in this regard to be as follows: (1) Given that the Lehleitner Award is not memorialized in the Agreement, there is nothing in the Agreement to interpret; (2) Since there is nothing in the Agreement to interpret, the Union is attempting to enforce in arbitration a matter which, if at all, should be an unfair labor practice before the ERB.

As to argument (1), the Employer takes an overly literal reading of the Union grievance's initial request for relief, predicated, as it was, on an interpretative dispute concerning the continuing vitality of the Lehleitner Award.

I find persuasive that the Union posits this controversy as one grounded in contract interpretation concerning whether Article 13 Existing Conditions has been breached by virtue of implementation of the Program as it affects companies. It contends this breach can be assessed by virtue of a reading of Article 13 which implicates the Program either because: (1) it upsets the workload *status quo ante*, or (2) because the compensation formula advanced in the Lehleitner Award, over time or by operation of law.

Now, the Union may be ultimately found incorrect concerning contractual breach, or contractual remedy, or both. But the Union grounds its position on an interpretation of certain sections of the Agreement, including Article 13, which requires an analysis of the Labor Agreement.

As to Employer argument (2), I am persuaded that the fact that a charge could be filed under the PECBA is not dispositive of whether the instant controversy is arbitrable. First, that there may exist concurrent jurisdiction to a controversy obviously does not deprive one of the forums of its jurisdiction. Second, no adverse inference to the Union's choice of forum is mandated where the scheme of the PECBA leaves open the possibility that an unfair labor practice lies precisely because there has not been compliance with an arbitration award.

The Labor Agreement contains the parties' agreement to arbitrate disputes. While arguments regarding the merits of a claim can coalesce with questions regarding arbitrator jurisdiction, I find that the Union's grievance is rooted in a specific claim which is subject to interpretation under the terms of the Labor Agreement.

B. The Merits of the Grievance

1. *Analytical Approach*

There is a common theme in the briefs of the parties, occasioned by virtue of the citation of some very useful ERB cases, that I should examine the underlying issues in this controversy much as would an ERB administrative law judge, rather than as an arbitrator interpreting the terms of the collective bargaining agreement.

At the same time, both parties admonish me that my opinion must "draw its essence" from the contract. The preceding quoted phrase, however, appears to have given rise to no little controversy since it first appeared as part of the *Steelworkers Trilogy* at *United Steelworkers v. Enterprise Wheel And Car Corp.,* 363 U.S. 593, 596-597 (1960). See, also, *Corvallis School District v. Corvallis Education Association,* 35 OR App 531, 535, 581 P2d 972 (1978); *Willamina Ed. Assoc. v. Willamina Sch. Dist. 30J,* 50 Or App 195, 202 n7, 623 P2d 658 (1981).

In fact, arbitrator application of external law is invited, even inevitable, in this controversy, since the parties have imported terminology from extrinsic sources of law into some of the terms of the Labor Agreement. Where the parties use language in their agreement which is identical to statutory language, pre-existing interpretation of that statutory language can be used as an interpretive aid with respect to contract language.

I do take as congruent to my own analysis the ERB approach in *IAM Woodworkers Lodge W-261 v. Roseburg Urban Sanitary Authority,* Case No. UP-75-97, 17 PECBR 757, 763 (1998), wherein the ERB followed the three part process of *Yogman v. Parrot, 325 OR 358, 937 P2d 1019 (1997)*:

First, the text of the disputed contract provision is examined in the context of the entire agreement. If the text is unambiguous, no further analysis is necessary;

Second, if the text is ambiguous, consideration is given to extrinsic evidence that would establish the parties' intentions;

Third, should that analysis not resolve any remaining ambiguity, appropriate maxims of contract construction are applied.

For purposes of my analysis of this controversy, the second level, above, seems apropos. However, some comments regarding some language of the Labor Agreement would be useful in light of argument advanced on brief and in the record.

I first would note my conclusion that extrinsic law provides neither more nor less for the Employer than the language of Article 3 Management Rights already provides in the circumstances of this case. While the Employer contends that Article 3 reflects ORS.243.650 (f) and the PECBA as amended in 1995, the specific language of Article 3 is in fact far more detailed and specific than the language of the Statute and the language does not mirror the terminology of the Statute. On brief, the Employer cites ERB case authority on the subject of managerial "assignment." However, while the cases may be instructive as to how ORS 243.650(f)'s language concerning "assignment of duties" should be interpreted under the Statute, and have general persuasive effect herein, they leave open for question how the parties intended that Article 3's reference to "assignment of work" should be interpreted under the Agreement.

While the Employer may have orally informed the Union during negotiations that it was importing whatever meaning the Statute had for purposes of its exercise of management rights, there is no evidence the Union accepted this construction when it signed on to precisely the same Article 3 language as had appeared unchanged in the parties' Agreements since at least 1990. Rather, all I see in this assertion is that the Employer was not clearly and unambiguously waiving any statutory rights. But it does not follow that the Union had clearly and unambiguously waived any of its statutory rights at the same time. In summary, I do not see that reliance on the PECBA during bargaining necessarily controls what the parties' intent might have been as measured under the language of the Labor Agreement and its collective bargaining history.

Article 13 Existing Conditions, wherein the word "mandatory" was inserted before the phrase "conditions relating to wages, hours, and working conditions" itself invites recourse to collective bargaining history and past practice. Much is implicated by Article 13. It extends coverage to subject matter not specifically delineated in the Agreement. And it utilizes terms (i.e., "mandatory"; "conditions of employment") found at ORS 243.650 of the PECBA.

But there is some circularity with respect to the use of this statutory terminology. Article 13 contains the phrase: "…*conditions* of employment *relating to* wages, hours and *working conditions,*…". Article 13 connects the word "mandatory" to the concept "conditions of employment." This is something the Statute itself does not do. In this regard, compare ORS 243.650(4)'s connection (traditional in labor law) of the word "mandatory" to the phrase "mandatory *subjects of bargaining*" with that of ORS.243.650 (7)(a)'s reference to "other conditions of employment" in the statutory definition of "employment relations." Thus, the Statute speaks in terms of mandatory *subjects* of bargaining instead of the mandatory conditions of employment which Article 13 addresses.

There is more in this regard. "(M)andatory conditions of employment" in Article 13 is defined in terms of subject matter as "relating to wages, hours and *working* conditions."

Again, Article 13 does not track the Statute's use of the phrase "conditions of *employment*." Instead, it employs the term "*working* conditions," which is something of a term of art in the field of labor relations, but which has found its way into much of the case law. Article 13 is consistent, however, with the language in Article 2 Recognition, which recognizes the Union as collective bargaining representative "for the purposes of establishing wages, hours and *working* conditions.

Finally, the subject heading of Article 13 removes itself entirely from the semantics above by characterizing Article 13 as covering *Existing* Conditions.

The above comments leave me, as I have indicated, at Level 2 of *Roseburg.* I construe the record evidence with respect to collective bargaining history and prior arbitral interpretation of Article 13(1) as establishing that the phrases "mandatory conditions" and "working conditions" are synonymous with each other and with the statutory concept of mandatory subjects of bargaining.

Article 3 specifically excludes from coverage those rights which may be "limited by specific provisions of the Agreement." And Article 13 is just such a limitation because the parties intended, by somewhat convoluted language, to make working conditions not specifically delineated in the Labor Agreement a mandatory subject of bargaining. To the extent the Employer seeks to exercise its prerogatives under Article 3, Article 13 is simply a limitation where the result is an adverse effect on working conditions so that they are not maintained "at the level" they were when the Agreement was "signed."

2. *The Lehleitner Award Is Not A Working Condition Within The Meaning Of Article 13(1)*

There is no support in the collective bargaining history or the language of Article 13(1) for the proposition that the Lehleitner Award is encompassed within its coverage.

The Memorandum of Agreement setting up the Lehleitner interest arbitration is dated February 8, 1991. The parties then reduced the terms of the Memorandum into the integrated 1990-1994 Labor

Agreement, which is dated March 22, 1991. All of this was accomplished well before the date of issuance of the Lehleitner Award of May 20, 1992.

Recall that Article 13(1) vests coverage of those "conditions relating to wages, hours and working conditions" only "at the level *in effect at the time of the signing of this Agreement.*" The Lehleitner Award was not in existence with the 1990-1994 Labor Agreement was signed. Whatever the Lehleitner Award may be, it could not ever be amenable to enforcement under the 1990-1994 Labor Agreement.

To ever be enforceable under Article 13(1)'s language, the formula of the Lehleitner Award would have to be an existing condition of employment under the succeeding 1994-1996 Labor Agreement, which was signed on December 22, 1994, over two years after the issuance of the Lehleitner Award. To explain, some recourse to traditional labor law concepts is required.

In *NLRB v. Katz,* 369 U.S. 736 (1962), the Supreme Court advanced the rule that unilateral changes in terms and conditions of employment are inherently inconsistent with the duty to bargain. "We hold that an employer's unilateral change in conditions of employment under negotiation is… a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." 369 U.S. at 743.

How are conditions of employment divined? Essentially, they are brought into existence either because a condition of employment has been established through contractual language or by virtue of past practice.

Katz was decided in the context of change made by an employer before any contract had ever been negotiated. But conditions of employment are also found in the language of a collective bargaining agreement, and these conditions, applying the *Katz* rationale, survive expiration of the collective bargaining agreement. *Litton Business Systems, Inc., v. NLRB,* 501 U.S. 190, 206-207 (1991). But, to be clear, the *Katz* rationale concerns a duty to maintain a duty to maintain terms and conditions of employment that may be initially created by contract or past practice. *Coos Bay Police Officers' Association,* 14 PECBR 229, 233 (1993).

Under the above principles, it cannot be said that the Lehleitner Award formula ever was a condition of employment at the point the succeeding 1994-1996 Labor Agreement was executed on December 22, 1994.

First, the Lehleitner formula was conditional: "If the workload of employees of fire companies is increased to include code enforcement inspection duties, …" It is not clear to me from the Opinion and Award why the formula was stated with a condition precedent. But inherent in the language is that company inspections need to go into effect, so that the compensation formula pertains. Consequently, since the condition never came into existence, there is no past practice on which to rely.

Second, as the Employer has consistently argued, the Union never moved to incorporate the Lehleitner formula as part of the 1990-1994 Labor Agreement by addendum or otherwise. Both parties thus dropped the matter. Of greater materiality herein, the Union made no demand to reduce the Award to a writing, notwithstanding that a company inspection program never went into effect. Under the terms of the February 8, 1991 Memorandum of Agreement, reducing the Award to writing was reasonably contemplated (otherwise there would be no reason to go to interest arbitration) and the Employer's refusal to do so would have been a violation of ORS 243.772(h). *Marion County Law Enforcement Association v.*

Marion County Sheriff, 14 PECBR 591m 596 (1993). See, also, *Southern Container, Inc.,* 330 NLRB No., 58 (1999)[statutory violation under NLRA based on failure to reduce to writing the terms of a side agreement on breaks and unilaterally eliminating break periods established by the collective bargaining agreement]

As of June 1994, when the 1990-1994 Agreement was set to expire, there was no writing in the Agreement or otherwise, to establish a condition of employment as it related to the terms of the Lehleitner formula.

In any event, the Employer repudiated any arguable vitality to the Lehleitner Award. The Employer's negotiator C____ informed the Union both before and after his letter dated September 14, 1994 that the terms of the Lehleitner Award applied only to the 1990-1994 Labor Agreement. Assuming the vitality of the Union's theory that the Award had post 1990-1994 Labor Agreement effect, this was a clear repudiation. The Union at that point, had one avenue available to it, assuming the statute of limitations had not run under ORS 243.672(3), and that was to file a charge under ORS 243.672(3) alleging a repudiation or a unilateral change to an existing condition of employment. Obviously, this did not occur.

Alternatively, the Employer gave notice of its intent to remove itself from the obligations of the Lehleitner formula. In that circumstance, it was incumbent on the Union to request bargaining on the notice of change to a condition of employment. The burden is on an employer to give notice of a change, but an employer's obligations are satisfied when a union does not request bargaining, unless the notice is inadequate or bargaining would be futile. *NLRB v. Emsling's Supermarket,* 872 F2d 1279, 1286-87; 131 LRRM 2296 (7th Cir 1989) The notice here was quite clear, and the Union could certainly have made a demand to bargain the decision or demand that the Lehleitner Award formula be incorporated into the 1994-1996 Labor Agreement. The Union's mere contention, without more, which it advanced in bargaining that the Lehleitner Award survived to become a condition of employment, is not persuasive under all the circumstances.

The consequence was that by the time the 1994-1996 Labor Agreement was executed on December 22, 1994, the Lehleitner Award formula could not be said to be a condition covered under Article 13(1) because it was not "in effect at the time" that Labor Agreement was signed.

3. *The Union's Grievance Raises A Working Condition Issue of Workload Under Article 13(1).*

The collective bargaining history is quite clear that workload is at the heart of the company inspections issue.

In 1986, a bargain was reached. In consideration for the increase in workload attributable to the Employer decision to take on first responder responsibilities, companies would not be assigned fire code inspections. That the Employer regards this solely as an assignment issue overlooks the fact that the post 1986 status quo was a product of this bargain. While there is a suggestion in the record that the bargain was attributable to increased training time, there is no real foundation for this position. Moreover, it would be illogical to assume that the Employer, in 1986, believed that medical training would be substantial, but not that the additional incident responses associated with first responder duties would be insubstantial. It is more reasonable that the projected increase in workload associated with first responder runs informed the bargain reached by the parties.

By 1990, the Employer appeared to indecisively advance an argument to the effect that company inspections were an assignment issue. The fact that the matter was referred to interest arbitration suggests that the Employer tacitly understood that workload was implicated.

Commencing in 1994, the Employer was more consistent in advancing its position that work assignment formed the rationale for its position on company inspections. But this really came too late. By this time, the record shows that medical response runs were on a steady rise. The Union was consistent in its position in collective bargaining that changing the status quo, absent agreement of the Union, was not part of the workload bargain. For its part, the Employer reinforced this position by withdrawing company inspection program proposals before signing a succeeding Labor Agreement. Notwithstanding its need to preserve its position that work assignment was a permissive subject, the status quo regarding company workload consequently remained unchanged.

4. *Article 13(1) Existing Conditions Is A Limited Exception To Article 3 Management Rights*

I take the Hayduke Award as persuasive authority that the Management Rights language, "Except as especially modified or restricted by this Agreement…," serves not to negate the management rights clause. (U-34, pp. 10-11) Rather, Article 13 only constitutes a limited modification or restriction.

The Employer argues that Article 3 took on a new dimension in 1995 with modifications to the PECBA. The short answer to this is that Article 3's language does not reflect this. As noted, the management rights clause does not track statutory language, nor did it undergo any change after 1995. While there is some use of common terms, the language of the clause is far more detailed than the Statute. In fact, it was not until the 1999-interest arbitration award that a change was made--but only to Article 13(1).

Although the Union had consistently taken the position that Article 13(1) applied only to mandatory subjects of bargaining, the Employer nevertheless undertook some effort to insert the "mandatory" modifier to "conditions of employment" within Article 13(1). The Employer thereby acted as if Article 13(1) constituted a modification or restriction to Article 3 by virtue of this conduct. The position advanced in the record that the Employer effectuated the modification to Article 13(1) to prevent the Union from using Article 13(1) to enforce permissive subjects of bargaining is unrealistic, given that the Union had previously maintained, at length, that Article 13(1) applied to mandatory subjects and particularly given its position, since at least 1990, if not 1988, that workload was a mandatory subject.

5. *Article 13 Prohibits Implementation Of The Program During The Contract Term*

To restate, there existed a certain bargain regarding workload on the date the current Labor Agreement was executed. That status quo was rather open ended as to allowing for the steady increase in runs, but there was a floor as to the imposition of entirely different work further impacting on general workload.

The Employer notes that current class specifications include company inspection duties. The short response to this is that class specifications have always included such duties. But a bargain was made in 1986 with respect to workload, and the Employer exercised some forbearance by ceasing the assignment of company code inspection duties to the point where special training concerning current Program requirements is necessary. Article 3's language, which preserves the right to exercise rights previously not exercised, is a hollow reservation in circumstances where special training is required.

That is the situation here. The work performed during structured time is quite circumscribed. The fact of the matter is that it is quite impossible to give short shift to the fighting of fires or the provision of emergency medical services. As a result, there is no question that the increase to work load will work a reduction in free time. See "Engine #42 24-Hour Shift;" "Commercial Building Fire Inspection: Opportunities to Improve Impact and Lower Costs" dated September 2000.

Some comment about the nature of the 24-hour work day is appropriate before addressing some further Employer arguments. There is another aspect to this concept of the status quo, and this relates, essentially, to the general concept of working conditions. In normal circumstances, workload carries the connotation of increased rate of productivity compressed within a normal 8-hour workday, or the idea of "working faster." With the 24-hour shift schedule, workload is increased when down time, or free time, is reduced.

The Employer on brief offers a tongue-in-cheek observation to the effect that the literal language of Article 13(1), i.e., "…not less than…," suggests that workload herein is a floor that can be raised, but not reduced. This is narrowly, not substantively, correct. If the term "working conditions" is to be given its fair meaning, there is a status quo which is to be maintained, and that status quo necessarily implicates such mandatory subjects as employee break time, or, in this instance, free time--something akin to break time. As the Union argues on brief, the balance of workload time to free time is affected. Thus, the issue is not whether Article 13(1) permits workload to increase, but whether free time may be reduced because of the workload burden.

6. *The Impact On Workload Is Not De Minimis Or Insubstantial*

Labor arbitrators have often declined to find a contract breach where the effect is *de minimis.* The parallel concept receives statutory codification under ORS.243 (7)(d)(f). As the Employer notes, there appears to be a dearth of ERB case law dealing with subjects that have been construed to have *de minimis* or insubstantial effect. Such guidance might be of some persuasive use, since the Legislature seems not to have applied entirely synchronous language between ORS.650 (f)[["…workload when the effect on duties is insubstantial,"] and ORS.243.650 (7)(d))["...shall not include subjects which have an insubstantial or de minimis effect…"]

Whatever the implications, the statutory concept appears parallel to the contract law concept. Accordingly, I will look to the language of Article 13(1) to apply the conventional contractual concept of *de minimis*, which follows the principle *De minimis non curat lex*, meaning the law does not concern itself with trifles.

Under this standard, any attempt to divine a practical distinction between the words *de minimis* and "insubstantial" would itself be trifling.

Two considerations take this controversy outside the realm of *de minimis* or insubstantial. The first is that a major principle is at stake for the parties--the interplay between Article 3 and Article 13(1) as it affects impacts on workload.

The second consideration is that the Program has effects on workload and the loss of free time which is <u>more</u> than *de minimis* and <u>not</u> insubstantial. I phase the proposition in this manner because this is how I understand the syntax of the Statute and the substantially parallel concept of contract law.

Consequently, I do not accept the Employer's suggestion that the Union must produce evidence of substantial impact on workload, or, in the alternative, that the Employer need show only that the workload impact of the Program is minimal. Instead, nothing more is required other than that the impact on workload be more than *de minimi*s or not insubstantial in order to invoke the strictures of Article 13(1).

In this regard, I take as persuasive, and rational, the Lehleitner Award's aggregate hours-per-year approach. In my view, this approach resulted in taking the 1992 Program outside the ambit of insubstantial.

The same yearly measure is apt for purposes of the current Program. The aggregate hours under the Program are not substantially different from that of 1992. Scenario A of E-13, pp., 1, 3, 5 constructs an average per day burden on a shift based on 2.34 shifts per week. As discussed previously, the Program does not work that way. I therefore first look to the inspections burden in terms minutes per week burden per shift. [This is arrived at by multiplying the daily burden times 2.34] As noted by the Union, this amounts to roughly 40-60 minutes per company inspection, depending on the Station. While the burden may be relatively circumscribed with respect to Station 4 (38.39 minutes), Station 18 takes 61.30 minutes per inspection and Station 42, 46.39. I do not construe the Scenario B numbers to reach a substantially different result.

To restate, the Program has an impact which is neither trifling, *de minimis* or insubstantial. As a result, the Employer has contravened the provisions of Article 13(1) by instituting the inspection goals of the Program on Phase 1, and by now, presumably, Phase 2 Stations.

AWARD

The language of Article 14 both vests and limits an arbitrator's authority. This language dates to at least 1977. The language also has a unique two-sentence construction: "The arbitrator's decision shall be final and binding on the parties, but the arbitrator shall have no power to alter in any way the terms of this agreement. The decision of the arbitrator shall be within the scope and terms of this agreement and … ."

On brief, each party points to different sentences to define the limits of an arbitrator's authority under the Labor Agreement. The Employer, relying on sentence 1, argues that any Award may not have the effect of altering in any way the terms of the agreement, thereby restraining an arbitrator from fashioning anything beyond the equivalent of a "cease and desist" type order [the Employer appears not to read the purpose of the word "but" in sentence 1 as constituting a caveat or proviso to the finality and binding effect of an award on the parties]; the Union points to the "scope and terms" language of the second sentence, an argues that, since the Lehleitner Award establishes a compensation formula, an Award giving effect to the formula falls within the "scope and terms" language. The Union argues, in the alternative, that a "cease and desist" Award would also be within the provisions of the "scope and terms" language.

Given the absence in the record of evidence relating to Article 14 collective bargaining history or past interpretation, it would appear that the *Roseburg* level 3 analysis would be appropriate, and maxims of contract construction may be applied. There exists the maxim of contract interpretation that specific language is controlling over general language. I read the language of sentence 1 as somewhat more specific in context than the language of sentence 2. Thus, I will give controlling significance to sentence 1 over the general language of the second 2.

Thus, it is appropriate to ignore the sense that only a caveat or proviso is intended by the use of the word "but." Instead, I construe the use of the word "shall" as having the function of an imperative for an arbitrator. It imposes an obligation on an arbitrator with respect to what is not permissible as to remedy. Such an interpretation would not offend the somewhat more general language of the second sentence.

Since I have concluded that the Lehleitner Award does not establish the status quo ante, but, rather, the status quo consists of present workload, monetary compensation for inspections already performed would not be appropriate. In this regard, Articles 7 Hours of Work and Article 8 Wages, Salaries and Allowances are so specific that there is little latitude for fashioning a monetary make whole remedy for inspection work already performed.

Accordingly:

1. The Employer's company fire code inspections Program to the extent that it mandates that Phase 1 and Phase 2 companies perform company fire code inspections violates Article 13(1) of the Labor Agreement.

2. The Employer shall cease and desist from continuing to require that Phase 1 and Phase 2 companies perform company fire code inspections, and the Employer shall cease any further such implementation with respect to remaining companies.

Consistent with the stipulation of the parties I will retain jurisdiction for purposes of resolving issues bearing on implementation or interpretation of this Award. This retained jurisdiction will not exceed a period of 60 days from the date of this Opinion and Award.

DATED at Oakland, California this 2nd day of May 2002.

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Charles H. Pernal, Jr., Arbitrator